(1)

Supreme Court, U.S.
FILED
MAR 27 1996
OFFICE OF THE CLERK

No. 95-1564

In The

Supreme Court of the United States

October Term, 1995

TERRY BURTON KIMBROUGH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR M. SCHWARTZ, P.C.
ARTHUR M. SCHWARTZ*
BRADLEY J. REICH
CINDY D. SCHWARTZ
Dominion Plaza
600 – 17th Street, Suite 2250-S
Denver, Colorado 80202
(303) 893-2500

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

96 PP

QUESTIONS PRESENTED FOR REVIEW

I. Whether the jury instructions pertaining to the elements of 18 U.S.C. §2252 were constitutionally infirm on the basis that they failed to charge the requisite *mens rea* regarding knowledge as to each of the statutory elements of the offense as required by *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 130 L.Ed.2d 372, 115 S.Ct. 464 (1994).

II. Whether the evidence admitted against Petitioner was seized pursuant to search warrants which were facially invalid for failure to sufficiently describe with particularity the items purportedly authorized to be seized, and whether the manner in which law enforcement officers executed the warrants constituted a general exploratory search in violation of Petitioner's rights as guaranteed by the First and Fourth Amendments to the United States Constitution.

III. Whether the Government's refusal to permit the defense to copy the items charged in the counts of conviction and the "unreasonable restriction of meaningful access to potential exhibits" prejudiced the substantial rights of Petitioner and deprived him of his constitutional rights of due process and a fair trial.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) 24, 28

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 17

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 18

Gavino v. MacMahon, 499 F.2d 1191 (2nd Cir. 1974) 28

Marcus v. Search Warrant, 367 U.S. 717 (1961) 16

Marrone v. United States, 275 U.S. 192 (1972) 16

Morissette v. United States, 342 U.S. 246 (1952) 12

Stanford v. Texas, 379 U.S. 476 (1965) 16

Staples v. United States, 511 U.S. ___, 128 L.Ed.2d 608 (1994) 12

United States v. Bocklus, 564 F.2d 1193 (5th Cir. 1973) 23

United States v. Buchanan, 585 F.2d 100 (5th Cir. 1978) 23

United States v. Cronic, 466 U.S. 663 (1984) 26, 27

United States v. Dzialak, 441 F.2d 212 (2nd Cir. 1971), *cert. denied*, 404 U.S. 883 (1971) 17

United States v. Freedman, 688 F.2d 1364 (11th Cir. 1985) 22

United States v. Hale, 784 F.2d 1465 (9th Cir. 1986), *cert. denied*, 479 U.S. 829 (1986) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Harvey, 991 F.2d 981 (2nd Cir. 1993) 20

United States v. James, 495 F.2d 434 (5th Cir. 1974) 23

United States v. Jenkins, 974 F.2d 32 (5th Cir. 1992) 18

United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) ..... *passim*

United States v. Marcus, 807 F.Supp. 934 (E.D.N.Y. 1992) 17

United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) 18

United States v. Rettig, 589 F.2d 418 (9th Cir. 1978) 18

United States v. Scruggs, 583 F.2d 238 (5th Cir. 1978) 23

United States v. Terrell, 754 F.2d 1139 (5th Cir. 1985) 26

United States v. Weber, 923 F.2d 1338 (9th Cir. 1990) 19

United States v. West, 828 F.2d 1468 (10th Cir. 1987) 27

Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978) 18

VonderAhe v. Howland, 508 F.2d 384 (9th Cir. 1986) 19

United States v. X-Citement Video, Inc., ___ U.S. ___, 130 L.Ed.2d 372, 115 S.Ct. 464 (1994) 10, 11, 12, 13, 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Rule 16, Federal Rules of Criminal Procedure.....9, 22

Rule 29, Federal Rules of Criminal Procedure 8

Rule 13.1, Rules of the United States Supreme Court 2

Rule 13.3, Rules of the United States Supreme Court 2

Title 18 U.S.C. §2..... 5

Title 18 U.S.C. §1465..... 5

Title 18 U.S.C. §2252..... *passim*

Title 18 U.S.C. §2253..... 5

Title 18 U.S.C. §3231..... 6

Title 28 U.S.C. §1254(1) 2

Title 28 U.S.C. §1291..... 9

United States Constitution, Amendment One 2, 17

United States Constitution, Amendment Four.....2, 17

United States Constitution, Amendment Five 3

United States Constitution, Amendment Six 3

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Terry Burton Kimbrough, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 9, 1995, and the subsequent denial of the Petition for Rehearing on December 28, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 9, 1995 and is reported as *United States of America v. Terry Burton Kimbrough*, 69 F.3d 723 (5th Cir. 1995). The opinion and judgment are reprinted in the appendix hereto, pp. 1-32, *infra*. The Court's order summarily denying the Petition for Rehearing is reproduced in the appendix hereto, pp. 33-34, *infra*.

No decisions by the United States District Court for the Northern District of Texas, Abilene Division, were reported in this case. However, that Court's memorandum order denying Petitioner's motion to suppress evidence is reprinted in the appendix hereto at pp. 35-36, *infra*. Petitioner's motions to continue the trial and to dismiss counts 1 through 4 of the indictment based upon the Government's refusal to permit the defense to copy the items charged therein and its unreasonable restriction of meaningful access to potential exhibits were summarily disposed of by the District Court. These orders are

reprinted in the appendix hereto, pp. 37, 39, *infra*, together with the Court's orders summarily denying Petitioner's motion to reconsider and motion for new trial which are reproduced in the appendix hereto, pp. 38, 40, *infra*.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were entered on November 9, 1995. A timely filed Petition for Rehearing was denied on December 28, 1995. Pursuant to Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States, this petition for writ of certiorari was timely filed within 90 days of that date.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment One

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

United States Constitution, Amendment Four

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Five

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

Title 18 U.S.C. §2252

(a) Any person who –

* * *

> (2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if –
>
> > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (B) such visual depiction is of such conduct;
>
> * * *
>
> (4) either –

* * *

> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –
>
> > (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

STATEMENT OF THE CASE

In or about February, 1993, the United States Customs Service launched "Operation Long Arm," a nationwide investigation of the illegal importation of child pornography from computer bulletin board systems in Europe. The target of the investigation in the instant case was the Petitioner, Terry Burton Kimbrough.

Based upon an affidavit prepared by Joel Kemp Johnson, a Special Agent with the United States Customs Service in San Angelo, Texas, search warrants were issued on March 2, 1993 by the Honorable J.Q. Warnick

Jr., Magistrate for the Northern District of Texas, purportedly authorizing a search of Petitioner's residence and place of employment located in Abilene, Texas. The search warrants were executed simultaneously on March 4, 1993 by approximately 20 individuals consisting of agents of the United States Customs Service, assisted by the Abilene Police Department and the Texas Department of Public Safety, Criminal Intelligence Division.

A voluminous number of items were confiscated from the premises, including, but not limited to, virtually all computer and computer related equipment, every computer disk and accessory, all presumptively protected videocassette and audiocassette tapes, numerous presumptively protected magazines, and hundreds of various records and documents. Each and every item which served as the basis for the indictment against Petitioner in the instant case was obtained pursuant to the execution of these warrants.

On or about July 27, 1993, an eight (8) count indictment was returned against Petitioner charging him with various violations of Title 18 of the United States Code pertaining to the shipment or distribution of allegedly obscene materials and/or trafficking in material involving the exploitation of a minor. Specifically, Petitioner was charged with the alleged violation of 18 U.S.C. §§2252(a)(2) and 2 (Counts 1 and 2); 18 U.S.C. §§2252(a)(4)(B) and 2 (Counts 3 and 4); 18 U.S.C. §§1465 and 2 (Counts 5, 6 and 7); and 18 U.S.C. §2253(a) (forfeiture – Count 8).

Each and every count of the indictment involved allegations relating to the violation of federal obscenity or

child pornography laws. Accordingly, jurisdiction over this action was conferred upon the District Court pursuant to 18 U.S.C. §3231.

Petitioner was arrested in Abilene, Texas on August 10, 1993 and transported to Lubbock for arraignment before Magistrate Warnick, at which time Petitioner entered a plea of not guilty to the charges contained in the indictment. Thereafter, the District Court entered a Pretrial Notice and Order setting the case for trial on October 4, 1993 and, further, ordering counsel, *inter alia*, to exchange exhibits and exhibit lists at least three (3) business days prior to the scheduled trial date.

Petitioner subsequently filed several motions, including a motion to designate the case complex and to continue the trial, a motion to dismiss counts 3 and 4 of the indictment which charged Petitioner with possession of child pornography, on the basis of multiplicity, a motion to dismiss counts 1 through 4 of the indictment on the basis that 18 U.S.C. §2252 is unconstitutional, a motion to suppress evidence on the basis of an unlawful search and seizure, and a motion for discovery which included a specific request to permit the defense to make copies of all computer files seized by law enforcement officials.

On or about September 10, 1993, the District Court entered orders granting Petitioner's discovery requests, which included production of materials for inspection *and copying*, and setting a hearing on Petitioner's suppression motion. The remaining motions, aforementioned, were denied by the Court without elaboration.

Defense counsel then received a letter from the Government informing them that the materials seized from

Petitioner's residence and place of employment would not be available for inspection until the week of September 20, 1993, a mere two weeks prior to the scheduled trial date. The letter further advised that Petitioner's counsel would not be permitted to copy the materials that served as the basis for the charges contained in counts 1 through 4, inclusive, of the indictment.

Due in part to the enormous volume of material seized from Petitioner, and the Government's delay and restrictions in providing the defense access to the material, Petitioner filed a supplemental motion to continue the trial, in addition to a motion to dismiss counts 1 through 4 of the indictment based upon the Government's refusal to provide copies of the materials that formed the basis of said counts. These motions were also denied.

A hearing on Petitioner's motion to suppress evidence based upon the unlawfulness of the search and seizure conducted was held on October 8, 1993. At the hearing, Special Agent Joel Kemp Johnson testified as to the nature and voluminous amount of material seized from Petitioner's business and residence, and that the seizure of such materials was subject to his discretion. Agent Johnson further testified that only a small percentage of the items seized were relevant to the indictment herein. At the conclusion of the hearing, the District Court denied Petitioner's motion.

A jury trial was commenced on October 12, 1993, the Honorable Sam R. Cummings, presiding. On the morning of trial, the Government tendered to the Court and defense counsel an amended exhibit list containing more

than three times the number of exhibits previously listed. Petitioner repeatedly objected to the admission of the late-endorsed exhibits, which objections were overruled throughout the course of the trial.

On October 13, 1993, the Government rested its case-in-chief. Petitioner moved again to require the prosecution to elect between counts 3 and 4 of the indictment on the basis that they were multiplicitous and, further, for a judgment of acquittal pursuant to Rule 29, F.R.Crim.P. Petitioner's motion was ultimately denied in part and effectively granted in part to the extent that the Court dismissed counts 5, 6 and 7 pursuant to the Government's oral motion conceding same.

Thereafter, Petitioner presented his case which consisted of the testimony of Kyle Hargrove, a computer graphic production specialist from Lubbock, Texas. Mr. Hargrove testified as to the various techniques used to manipulate photographic and video images and to convert them into computer images. Following the testimony of Petitioner's witness, the defense rested. No rebuttal witnesses were called by the Government.

Counsel, out of the presence of the jury, then entered into a stipulation as to Count 8 of the indictment regarding forfeiture of several of the items seized. Petitioner also lodged his several objections to certain of the jury instructions tendered, including those pertaining to the elements of 18 U.S.C. §2252, which objections were overruled. Following closing arguments, the District Court proceeded to instruct the jury. The jurors subsequently returned their verdict finding Petitioner guilty on the remaining counts 1 through 4 of the indictment.

On or about October 22, 1993, Petitioner filed a Motion For New Trial which was denied by order of the District Court on October 25, 1993. Accordingly, the Court entered its final Judgment in a Criminal Case on January 21, 1994. At that time, Petitioner was sentenced to a term of imprisonment for 72 months as to counts 1 and 2 of the indictment, and 60 months as to counts 3 and 4, with all sentences to run concurrently. In addition, counts 5, 6, 7 and 8 were dismissed, and Petitioner's request for release or stay pending appeal was granted.

Following entry of the judgment, Petitioner timely filed a Notice of Appeal with the District Court on January 21, 1994, appealing the judgment of conviction, including sentence imposed under the Sentencing Reform Act, and denial of his post-trial motions. Jurisdiction in the United States Court of Appeals for the Fifth Circuit was proper under 28 U.S.C. §1291.

On November 9, 1995, the Fifth Circuit reversed Petitioner's conviction and sentence as to counts 3 and 4 of the indictment on the basis that they were multiplicitous, but affirmed as to counts 1 and 2. In so doing, the Court held that the search warrants issued in the instant case were sufficiently particular in their description of the items to be seized and that the manner in which law enforcement officers executed the warrants did not turn an otherwise valid search into a general one. The Court further held that F.R.Crim.P. 16 did not provide for the copying of alleged contraband by the defense and that, in any event, Petitioner failed to demonstrate any actual prejudice from his inability to procure copies of the items charged. The Court also determined that Petitioner was not unfairly prejudiced by the District Court's refusal to

continue the trial in spite of the Government's unreasonable restriction of meaningful access to potential exhibits and, additionally, that the jury instructions adequately explained the requisite scienter as to the statutory elements of 18 U.S.C. §2252 in accordance with *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 130 L.Ed.2d 372, 115 S.Ct. 464, 472 (1994).

A petition for panel rehearing was summarily denied on December 28, 1995. Petitioner subsequently filed a motion to stay issuance of the mandate pending the filing of the within application for writ of certiorari. The Fifth Circuit denied Petitioner's request and the mandate issued on January 4, 1996. Accordingly, the case was remanded to the District Court which entered an order vacating Petitioner's conviction as to Count 3 and amended the judgment accordingly. Petitioner was ordered to surrender to the Bureau of Prisons to commence serving his sentence on February 24, 1996 and currently remains incarcerated.

REASONS FOR GRANTING THE WRIT

I. The Jury Instructions Pertaining To 18 U.S.C. §2252 Were Constitutionally Infirm In That They Failed To Charge The Requisite *Mens Rea* Regarding Knowledge As To Each Of The Statutory Elements Of The Offense In Direct Contravention Of This Court's Decision In *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 130 L.Ed.2d 372, 115 S.Ct. 464 (1994)

Petitioner was charged and convicted on four counts of an indictment[1] involving the child pornography statute, 18 U.S.C. §§2252, which states in pertinent part:

> (a) Any person who –
>
> * * *
>
> (2) *knowingly* receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> (emphasis added).

---

[1] Petitioner's conviction on Count 3 of the indictment was subsequently vacated as multiplicitous. *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995).

The foregoing statute contains three separate elements: 1) a trafficking component; 2) an age component; and 3) a conduct component. Accordingly, in order to convict an accused of such a crime, the Government must prove beyond a reasonable doubt: 1) that the defendant received or distributed the material in question; 2) that the producing of the material involved the use of a minor engaged in sexually explicit conduct; and 3) that the material, in fact, depicted such conduct.

In *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), the Ninth Circuit struck down §2252 as unconstitutional on the basis that the statute permits the conviction of a person who does not know the child-pornographic nature of the material received. However, this Court declined to follow the Ninth Circuit's rationale, and relying on *Staples v. United States*, 511 U.S. ___, 128 L.Ed.2d 608 (1994) and *Morissette v. United States*, 342 U.S. 246 (1952), chose instead to construe the scienter requirement of "knowingly" to apply to *each* of the major statutory elements contained in §2252. *United States v. X-Citement Video, Inc., supra*, 115 S.Ct. 464.

Over Petitioner's objections, the District Court in the instant case charged the jury as follows with respect to the statutory elements of §2252:

> For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> First: That the defendant knowingly received certain visual depictions;

> Second: That such visual depictions were shipped or transported in foreign commerce;
>
> Third: That such visual depictions were shipped or transported in foreign commerce by any means, including by computer;
>
> Fourth: That the production of such visual depictions involved the use of a minor engaging in sexually explicit conduct;
>
> Fifth: That such visual depictions are of minors engaged in sexually explicit conduct; and
>
> Sixth: That the defendant knew that at least one of the performers in such visual depictions was a minor.

The instructions as to counts 3 and 4 were substantially similar, but substituted the possession language for the receiving language.

Petitioner asserts that the instructions pertaining to 18 U.S.C. §2252 tendered to the jury at trial in the instant case failed to properly charge the requisite scienter as to each element of the offense and are in direct conflict with this Court's Opinion in *X-Citement Video*. Specifically, the jury instructions given in the instant case not only break the statute down into six elements instead of three, but mention the word "knowingly" only twice. The first mention of the word "knowingly" in the jury instruction is found in the first sentence of the instruction, and applies to the "knowing" receipt of the material. Petitioner concedes that this is proper. The District Court then set out the second element as follows: "[t]hat such visual depictions were shipped or transported in foreign commerce. . . . " There is unquestionably no scienter element

mentioned here, nor is there any scienter element mentioned in the third element listed by the Court, "[t]hat such visual depictions were shipped or transported in foreign commerce by any means, including computer."

The fourth element listed by the District Court is that the production of such visual depictions involved the use of a minor engaging in sexually explicit conduct. Although there is absolutely no mention of the word "knowingly" contained in the fourth element as given in the instruction, the Court's sixth element arguably does in fact set forth the requirement. Specifically, the sixth element, as instructed by the District Court, provides that the defendant must be proven to have known that at least one of the performers in such visual depiction was a minor. It is at this point that the unconstitutionality of the instruction arises. The fifth element of the Court's instruction simply states "[t]hat such visual depictions are of minors *engaged in sexually explicit conduct.*" (Emphasis added). There is *no* mention in the fifth element of a knowledge requirement, nor is there in any of the other elements set forth by the District Court that in order to convict, it must be proven not only that a defendant *knowingly received the material,* and not only that he *knew at least one of the performers was a minor,* but in addition, that he *knew the depictions were sexually explicit in nature.*

In its opinion, the Fifth Circuit concluded that the "jury instructions properly charged scienter with regard to the age of the performer," *United States v. Kimbrough, supra,* 69 F.3d at 733, but never addressed the issue that if, in fact, the sixth element as set forth in the District Court's instructions applies to the age of the performer,

then that Court gave absolutely *no* instruction regarding the knowledge requirement as it is constitutionally mandated to apply to the *nature of the materials*.

The significance of the error inherent in the District Court's jury instructions regarding the requisite scienter is exacerbated by the fact that the instructions are immensely confusing, as well as contrary to statute and caselaw. Specifically, §§2252(a)(2) and (4) both require that:

> (A) [the defendant knew] the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and
>
> (B) [the defendant knew] that such visual depiction is of such conduct.

The District Court's *only* scienter instruction that could even remotely be construed as applying to *either* subsection (A) or subsection (B), but certainly *not both*, is to the effect that it must be proven that the defendant knew at least one of the performers in the visual depiction was a minor. The obvious deficiency in this instruction is that it does *not* require that the defendant knew that the *production* of the visual image involved the use of a minor engaging in sexually explicit conduct. Nor does this instruction require that it be proven the defendant knew that the depiction was of *sexually explicit conduct* involving a minor. Rather, the instruction simply requires a showing that the defendant knew at least one of the performers was a minor.

Accordingly, this Court should grant certiorari to review the Fifth Circuit's opinion with regard to the jury

instructions pertaining to 18 U.S.C. §2252 and determine whether it conflicts with this Court's decision in *X-Citement Video* by failing to require the instructions charge the requisite *mens rea* regarding knowledge as to each of the statutory elements of the offenses of conviction.

II. The Search Warrants Issued In The Instant Case Were Facially Invalid In That They Failed To Sufficiently Describe With Particularity The Items Purportedly Authorized To Be Seized, And Were Executed By Law Enforcement Officers In A Manner That Constituted A General Exploratory Search In Violation Of Petitioner's Rights As Guaranteed By The First And Fourth Amendments To The United States Constitution

The Fourth Amendment to the United States Constitution requires that all warrants contain "particular descriptions" of the things to be seized; a requirement which "makes general searches impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marrone v. United States*, 275 U.S. 192 (1972). Moreover, in cases where warrants seek to seize material presumptively protected by the First Amendment, higher procedural standards are mandated. *Marcus v. Search Warrant*, 367 U.S. 717 (1961); and *Stanford v. Texas*, 379 U.S. 476 (1965). Contrary to the Fifth Circuit's opinion in the instant case, Petitioner asserts the search warrants issued and executed herein fell woefully short of these requirements, and the evidence admitted against him was seized in violation of his constitutional rights as guaranteed by the

First and Fourth Amendments to the United States Constitution.

First, the search warrants in the instant case lacked the requisite specificity. Not only was the determination as to which items were to be seized admittedly subject to the sole discretion of Agent Johnson, but not a *single* publication or film was specified by title or description, despite testimony that the Government knew at least two of the file titles to be seized. *See e.g. United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), *cert. denied*, 479 U.S. 829 (1986); and *United States v. Marcus*, 807 F.Supp. 934 (E.D.N.Y. 1992) [similarly worded search warrant deemed unconstitutional]. Moreover, the affidavit in the instant case was completely silent as to sexually explicit material involving adults, and the issuing magistrate had no opportunity to "focus searchingly" on the issue of obscenity with regard to those items. *Marcus v. Search Warrant, supra*, 367 U.S. at 731. Indeed, absolutely *no* reference was made in the warrants regarding the authorization to seize *any* sexually explicit material involving only adults. *Id.* Despite this obvious omission, a number of such items were in fact confiscated from Petitioner, some of which served as the basis for several of the charges in the indictment.

In addition, the Fourth Amendment to the United States Constitution strictly confines an officer executing a search warrant to the bounds set by the warrant. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971); and *United States v. Dzialak*, 441 F.2d 212 (2nd Cir.), *cert. denied*, 404 U.S. 883 (1971). Although the Fifth Circuit's opinion in the instant case recognized the established

legal principle that "[b]latant disregard by executing officers of the language of the search warrant can transform an otherwise valid search into a general one, and, thus, mandate suppression of all evidence seized during the search," *United States v. Kimbrough*, 69 F.3d at 728, citing *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); and *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988), it concluded that Petitioner "failed to meet his burden of proof challenging the execution of the search warrants in the instant case." *Id.* Petitioner respectfully submits that the record in the instant case is replete with instances that establish the actions of the executing officers were inconsistent with a good faith execution of the search warrants and greatly exceeded even the minimal limitations contained in those warrants which originally gained them entry to the premises.

More particularly, the search warrants in the instant case were expressly limited to visual depictions of "a minor engaging in sexually explicit conduct." However, law enforcement officials admittedly seized *every* videotape found at the premises even though they were not specifically authorized to be taken under the warrants. Not only were such items nowhere specified in the warrants by title or otherwise, but they were seized in violation of well settled law "that the government may not seize presumptively protected speech materials without a prior judicial determination of obscenity." *United States v. Jenkins*, 974 F.2d 32, 35 (5th Cir. 1992), *citing Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); and *Universal Amusement Co. v. Vance*, 587 F.2d 159, 169 (5th Cir. 1978) (*en banc*), *aff'd*, 445 U.S. 308 (1980).

The Fifth Circuit seemingly sidestepped the lack of authority for the wholesale seizure of the videotapes with only a passing reference to the Government's purported justification for such a seizure. Specifically, the Government claimed the mass seizure was necessary because the videotapes "could" be "potential 'hiding places' for child pornography." Notably, at no time prior to Petitioner's challenge to the search did Agent Johnson, in his Affidavit or elsewhere, suggest this to be the case.

Furthermore, the expansion of the terms of the search warrants to include any item that "could" be a "potential hiding place" for child pornography trivializes the Fourth Amendment requirement of particularity in search warrants since virtually anything *"could"* be a *"potential* hiding place" for an unlawful visual depiction of a minor. Without a meaningful particularity requirement, search warrants are easily converted into "a general exploratory rummaging in a person's belongings." *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990), quoting *VonderAhe v. Howland*, 508 F.2d 384 (9th Cir. 1986).

This is precisely what occurred in the instant case. The Government claimed that the seizure of every videotape was necessary because their contraband nature "would not be readily ascertainable by a cursory examination on the spot." *United States v. Kimbrough, supra*, 69 F.3d at 728. Consequently, the Fifth Circuit concluded that law enforcement officers were not required to view *every* videotape on premises. *Id.* However, this conclusion is inconsistent with the Court's earlier finding that the "[i]dentification of visual depictions of minors engaging in sexually explicit conduct . . . is a factual determination *that leaves little latitude to the officers.*" *Id.*, at 727-728

(emphasis added). Indeed, law enforcement officers in the instant case failed to conduct an on premises review of *any* of the videotapes seized which included general releases such as "Star Trek" and "Batman" that were commercially packaged and labeled. In light of the Fifth Circuit's Opinion, the failure of agents to conduct an on premises review of these items, at the very least, is indicative of their lack of good faith.

Most importantly, perhaps, absolutely *none* of the videotapes contained child pornography. However, obscenity charges were later predicated on several of the adult videotapes which were unlawfully seized under the pretext of the Government's asserted *post hoc* justification. Although those counts were ultimately dismissed by the Government, such dismissal did not occur until *after* the material had been presented to the jury. The viewing of those items almost certainly had a prejudicial inflammatory impact on the jury. *United States v. Harvey*, 991 F.2d 981 (2nd Cir. 1993).

The absence of good faith is further evidenced by the manner in which the agents conducted the document search. The search warrants issued in the instant case purportedly authorized the seizure *only* of those documents and records "which show orders and deliveries to or from any known foreign or domestic distributor of child pornography." As previously discussed, the lack of guidance in the warrants admittedly left the seizure of such materials to the unfettered discretion of Agent Johnson. Consequently, the law enforcement officials who executed the warrants converted their purported authority to seize such documents into a general exploratory search by rummaging at will among files and personal papers

resulting in the seizure of virtually every record, document and paper found at the premises.

The return of inventories reveals repeated entries of confiscated items vaguely identified only as miscellaneous papers, notes or documents. These items were seized from almost every conceivable area of the premises, ranging from "misc. papers" found in a purse belonging to Petitioner's wife, to identically identified items retrieved from a garbage can located on the patio. This, despite Agent Johnson's statement in his Affidavit for the warrants that "[i]ndividuals involved in the sexual exploitation of children through child pornography rarely, if ever, dispose of their sexually explicit material."

The actions of law enforcement officers themselves demonstrate not only that they failed to confine their search in good faith to the specified items listed in the warrants, but actively flouted the provisions of the warrants by conducting a document search as if no limiting warrants existed. Contrary to the Fifth Circuit's finding that "numerous" documents seized were later determined to be irrelevant, *United States v. Kimbrough*, 69 F.3d at 728, the Government conceded that *less than five percent* of the documents seized were deemed to be relevant to this case, and absolutely none of the videotapes contained child pornography. Though not dispositive, the fact that only a fraction of the voluminous number of items seized were deemed relevant to this case further supports Petitioner's assertion that the character of the agents' execution of the search warrants was bad from the start and must be condemned as unconstitutional.

III. The Government's Refusal To Permit The Defense To Copy The Items Charged In The Counts Of Conviction And The "Unreasonable Restriction of Meaningful Access To Potential Exhibits" Prejudiced The Substantial Rights Of Petitioner

On or about September 10, 1993, Petitioner filed, *inter alia*, a motion seeking discovery in accordance with Rule 16 of Federal Rules of Criminal Procedure. A careful reading of the rule reveals that it unequivocally compels the disclosure of documents and tangible objects, the discovery of which is plainly a matter of right under any of the following circumstances:

> (a) disclosure is material to preparation of the defense; or
> (b) the government intends to use the document or tangible object in the presentation of its case in chief at trial; or
> (c) the document or tangible object was obtained from or belongs to the defendant.

In addition, "Rule 16 gives defendants access to the documents so that they may copy the documents should they desire to do so." *United States v. Freedman*, 688 F.2d 1364 (11th Cir. 1985).

On or about September 10, 1993, the District Court issued an order granting Petitioner's discovery requests which included a specific request "to have access to the *original* materials, as well as the ability to make copies of all computer files taken by the government in connection with the instant case." Despite the unequivocal language of Rule 16, F.R.Crim.P., and in blatant defiance of the District Court's order, the Government advised defense counsel via telefax communication that they would not be

allowed to copy or photograph any of the material that served as the basis for the charges contained in counts 1 through 4, inclusive, of the indictment. The Government's refusal to comply with the court-ordered request was its purported interest in "preventing more copies of the material from being made." However, not only did the Government fail to bring its concern before the trial court by way of a protective order, but it was not a justified concern in light of the fact that the Government had already made working copies of the subject material for use by its own experts.

In *United States v. Buchanan*, 585 F.2d 100, 101 (5th Cir. 1978), the Fifth Circuit recognized that, in addition to requiring inspection of material subject to disclosure, Rule 16(a)(1)(C) obligates the government to provide copies or photographs of such material upon request by the defendant. The failure to do so constitutes non-compliance with Rule 16. *Id.* Moreover, the government's failure to produce evidence for discovery requires reversal if the defendant is prejudiced thereby. *See e.g., United States v. Scruggs*, 583 F.2d 238 (5th Cir. 1978); *United States v. James*, 495 F.2d 434 (5th Cir. 1974); *United States v. Bocklus*, 564 F.2d 1193 (5th Cir. 1973).

Despite the foregoing cases, the Fifth Circuit in the instant case determined that the result at most was merely a technical violation of the rules. To the contrary, however, the Government's refusal precluded Petitioner from having an opportunity to evaluate the materials and to raise other potential defenses, thereby violating his fundamental rights to due process and a fair trial.

Specifically, due to the nature of the charges contained in the indictment against Petitioner it was necessary for him to retain expert witnesses concerning certain elements of the offenses, including the ages of the alleged minors who purportedly appeared in the materials that formed the basis of counts 1 through 4. The Fifth Circuit has expressly recognized the importance of providing a defendant with the opportunity to have an expert of his own choosing examine critical pieces of evidence the nature of which, as in the instant case, is subject to varying expert opinion. *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). In *Barnard*, the Court determined that "[t]he question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense." *Id.*

Here, as in *Barnard*, the Government itself called an expert as a key witness in its case-in-chief at trial. Although the Government offered to make the items available for inspection, this alternative was simply insufficient in this case considering the "unreasonable restriction of meaningful access" to the materials. *United States v. Kimbrough, supra*, 69 F.3d at 732. While the Government's expert had full and uninhibited access to the materials that served as the basis for Petitioner's conviction, it not only refused to permit the defense to copy the materials for use by its experts, but only permitted the defense limited access to the materials for a period of five days, just two weeks prior to the scheduled trial date. By limiting any meaningful access to the very materials that formed the basis of these charges, the Government made it impossible for Petitioner to obtain an expert to evaluate these materials and prepare an adequate defense.

The egregiousness of the Government's delay and restrictions in providing the defense access to the voluminous amount of material seized in this case was exacerbated by the District Court's repeated denial of Petitioner's requests to continue the trial to afford the defense an adequate opportunity to prepare, and the Government's late endorsement of many of its exhibits at trial. More particularly, Petitioner asserts that the District Court's refusal to continue the trial to enable the defense to have sufficient time to review the thousands of documents and other objects seized, and the Court's later admission of numerous Government exhibits which were not disclosed to the defense until the morning of trial, substantially prejudiced Petitioner and deprived him of the fundamental constitutional right to a fair trial.

On August 10, 1993, the District Court entered a Pretrial Notice and Order setting the case for trial and requiring counsel in the instant case to furnish a list and exchange exhibits "at least three (3) business days before the scheduled date for trial." Prior to trial, Petitioner filed several motions to continue due in part to the enormous volume of material allegedly seized from Petitioner, and the Government's delay and restrictions in providing the defense access thereto. However, Petitioner's requests were summarily denied by order of the District Court.

Petitioner's inability to review the massive amount of material seized so as to be able to prepare an adequate defense was compounded by the Government's imposition of severe time constraints within which to do so. As discussed, *supra*, the Government sent defense counsel a telefax communication informing them that they would have only limited access to the material for a period of

five days just two weeks prior to the scheduled trial date. Upon receipt of the telefax communication from the Government, Petitioner filed a Motion to Dismiss Counts 1 Through 4 of the Indictment, and supplemented his motion to continue the trial date. Again, however, Petitioner's requests were denied without elaboration.

In its opinion, the Fifth Circuit condemned the "unreasonable restriction of meaningful access to potential exhibits," *United States v. Kimbrough, supra,* 69 F.3d at 732, but, relying on this Court's decision in *United States v. Cronic,* 466 U.S. 663 (1984), concluded that Petitioner was not prejudiced thereby, nor by the District Court's refusal to grant the defense's request for a continuance. Petitioner submits that the instant case is distinguishable from *Cronic* on its facts. Unlike *Cronic,* the nature of the charges in the instant case did not involve a straight forward criminal defense, but were technologically complex and raised novel issues relating to the international and interstate transmission of allegedly obscene images via computer. Nor were the circumstances such that it was reasonable to expect that counsel could adequately prepare for trial in the limited time permitted. Neither the witnesses nor the evidence were easily accessible to defense counsel in the instant case.

Moreover, the Fifth Circuit seemingly ignored its prior decision in *United States v. Terrell,* 754 F.2d 1139, 1149 (5th Cir. 1985), which was decided after *Cronic* and delineated the factors to be considered in determining whether the denial of a continuance is arbitrary or unreasonable. In *Terrell,* the Fifth Circuit held that where "the purpose for requesting the continuance was for trial preparation, a defendant must show that the court acted

with 'unreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable delay.'" Several factors are considered in determining whether the denial of a continuance is arbitrary or unreasonable, including: the diligence of the party requesting the continuance; the likelihood that the continuance, if granted, would accomplish the purpose expressed by the requesting party; the inconvenience to the opposing party, witnesses and the court; the need asserted for the continuance and the potential harm the requesting party would suffer as a result of its denial. *See e.g., United States v. West*, 828 F.2d 1468, 1470 (10th Cir. 1987).

These factors, when considered in light of the facts in the instant case, establish that the District Court's denial of Petitioner's requests to continue the trial was arbitrary and unreasonable, and constituted an abuse of discretion. First, the District Court's denial of the continuance precluded the defense from having an adequate opportunity to review the material seized, and from obtaining an expert to evaluate the subject material and to refute the testimony presented by the Government's expert. As discussed, *supra*, the defense was permitted only limited access to the material a mere two weeks prior to the scheduled trial date. However, it is undisputed that a voluminous amount of material was seized, including more than 2,500 computer disks, hundreds of records, and numerous videocassette and audiocassette tapes, and magazines. Indeed, so many items were purportedly seized that it took five or six law enforcement officers five or six days to view all of the videocassette tapes, and additional agents required seven months, up until the day of trial, to review other items seized. Moreover,

expert testimony was particularly critical in this case to refute the testimony of the Government's own expert. *Barnard v. Henderson, supra,* 514 F.2d 746.

That the defense was not afforded an adequate opportunity to review the voluminous amount of material seized is but only one of several factors to be considered. Additionally, Petitioner diligently sought the continuance a month prior to the scheduled trial date and, in any event, within the time allotted for filing such motions. Furthermore, Petitioner likely could have obtained an expert to assist him in his defense had the continuance been granted. Finally, the record is devoid of any indication that a timely filed request to continue a month prior to trial would have inconvenienced anybody. *See e.g., Gavino v. MacMahon,* 499 F.2d 1191, 1196 (2nd Cir. 1974) [district court's refusal to grant a reasonable continuance to enable the defendants to prepare for trial "represented a gross abuse of discretion"].

Finally, the Fifth Circuit's conclusion that Petitioner was not unfairly prejudiced by the admission of the Government's late endorsed exhibits failed to take into consideration the context in which the asserted error occurred. Specifically, the parties were ordered to exchange exhibits and exhibit lists no later than three (3) business days prior to trial. Nonetheless, on the morning of trial, the Government tendered an amended exhibits list containing additional exhibits. These late endorsed exhibits were presented in the Government's case-in-chief. The Government had knowledge of these exhibits no later than October 7, 1993, at least five days, including one business day, prior to the commencement of the trial in this case. Indeed, all of the parties were present in

court on October 8, 1993 for a suppression hearing, yet at no time did the Government advise the defense of these additional exhibits in blatant defiance of the District Court's pre-trial order.

Clearly, Petitioner was unfairly prejudiced by the admission of the Government's untimely disclosed exhibits into evidence over defense counsel's repeated objections. Not only was the defense effectively denied an adequate opportunity to prepare for its cross- examination of these exhibits, but it hardly could have had knowledge of their existence in light of the "unreasonable restriction of meaningful access to potential exhibits." The result was nothing short of that sort of trial by ambush the rules were designed to prevent and deprived Petitioner of his constitutional right to a fair trial.

CONCLUSION

For the foregoing reasons, Petitioner, Terry Burton Kimbrough, respectfully requests this Honorable Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed, in part, the judgment of the District Court in this case.

Dated: March 27, 1996

Respectfully submitted,

ARTHUR M. SCHWARTZ, P.C.
ARTHUR M. SCHWARTZ*
BRADLEY J. REICH
CINDY D. SCHWARTZ
Dominion Plaza
600 – 17th Street, Suite 2250-S
Denver, Colorado 80202
(303) 893-2500

Attorneys for Petitioner

*Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS
FILED
JAN. 8 1996
NANCY DOHERTY,
CLERK
By: s/ _____
Deputy

U.S. COURT OF APPEALS
FILED
NOV. 9, 1995
CHARLES R. FULBRUGE, III,
CLERK

No. 94-10088

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus.

TERRY BURTON KIMBROUGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before Reavley and Emilio M. Garza, Circuit Judges, and Prado*, District Judge.

---

* District Judge of the Western District of Texas, sitting by designation.

EDWARD C. PRADO, District Judge:

Terry Burton Kimbrough appeals his convictions for two counts under Title 18 U.S.C. Section 2252(a)(2) and 2 for receipt of child pornography and for two counts under Title 18 U.S.C. Section 2252(a)(4)(B) and 2 for possession of child pornography. For the following reasons, his conviction is affirmed in part and reversed in part.

BACKGROUND

In 1992, the United States Customs Service (USSC) became aware of a computer bulletin board system (BBS) in Denmark known as BAMSE. USSC began to investigate BAMSE and discovered the BBS was involved in the international distribution of pornography, including child pornography, via computer. USSC also uncovered two additional Danish BBS's which included child pornography. Subscribers to these BBS's can transport or "download" Graphic Interchange Format (GIF) files through modems attached to their computers. Once downloaded, the files can be viewed as pictures on the computer screen and they can be printed. Further investigation disclosed that a person identifying himself as Terry Kimbrough with the defendant's office address and phone number had downloaded two GIF files containing child pornography.

In February of 1993, USSC held a three-day briefing for its agents on its investigation, known as Operation Long Arm, into the illegal importation of child pornography from computer bulletin boards. The agents received training regarding the applicable law, technical methods

for computer searches and seizures and evidence handling. After the training program, Agents Kemp Johnson and Eric Rembold commenced further investigation of Kimbrough and, based on the information uncovered, eventually applied for search warrants for Kimbrough's home and business in Abilene, Texas.

On March 4, 1993, agents executed search warrants for Kimbrough's residence and business. During the execution of the warrants, they seized a number of items including computers and computer related equipment, computer disks and accessories, videocassette and audio cassette tapes, magazines, receipts, ledgers, and various records. Among the seized materials were several depictions of child pornography primarily recovered from the computer equipment.

Kimbrough was indicted in Count 1 and Count 2 for knowingly receiving, by computer, a visual depiction, which had been transported in interstate commerce and the production of which involved the use of a minor engaging in sexually explicit conduct in violation of Title 18 U.S.C. Sections 2252(a)(2) and 2; in Count 3 of knowingly possessing three or more matters which contain visual depictions that had been shipped and transported in interstate and foreign commerce, the production of which involved the use of a minor engaging in sexually explicit conduct and which visual depictions were of such conduct in violation of Title 18 U.S.C. Sections 2252(a)(4)(B) and 2; in Count 4 of knowingly possessing three or more matters which contain visual depictions, produced using materials which had been transported by any means, including interstate and foreign commerce, the production of which involved the use of a minor

engaging in sexually explicit conduct and which visual depictions were of such conduct in violation of Title 18 U.S.C. Sections 2252(a)(4)(B) and 2; in Counts 5-7 of knowingly using a means of interstate commerce for the purpose of transporting obscene material in interstate commerce in violation of Title 18 U.S.C. Sections 1465 and 2; and in Count 8 of forfeiture pursuant to Title 18 U.S.C. Section 2253(a). The Government subsequently dropped Counts 5, 6 and 7. After a jury trial, Kimbrough was found guilty of Counts 1-4 and sentenced to a term of imprisonment of 72 months as to Counts 1 and 2 of the indictment and 60 months as to Counts 3 and 4, with all sentences to run concurrently.

DISCUSSION

Legality of Search and Seizure Issue

Kimbrough contends that the search warrants were unconstitutional on their face because, considering that many of the items were "presumptively protected speech," the warrants failed to sufficiently specify with particularity the items to be seized. The warrants sought seizure of

> Tapes, cassettes, cartridges, streaming tape, commercial software and manuals, hardware, computer disks, disk drives, monitors, computer printers, modems, tape drives, disk application programs, data disks, system disk operating systems, magnetic media-floppy disks, CD ROMs, tape systems and hard drive, other computer related operational equipment, and other similar materials in addition to, magazines, photographs, negatives, photographic slides, video

> cassette tapes or other visual depictions or equipment used to visually depict a minor engaging in sexually explicit conduct, and, bills, correspondence, receipts, ledgers, Postal receipts and telephone records all of which show orders and deliveries to or from any known foreign or domestic distributer of child pornography.

The Fourth Amendment prohibits issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime. *Andreson v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). A warrant must particularly describe the place to be searched and the person or things to be seized. *Id.*; *United States v. Layne*, 43 F.3d 127, 132 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1722, 131 L.Ed.2d 580 (1995). In testing whether a specific warrant meets the particularity requirement, a court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. *Layne*, 43 F.3d at 132. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the *types* of items to be seized. *Id.* In cases where warrants seek to seize material presumptively protected by the First Amendment, the level to which the items to be seized must be particularly described is heightened. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961).

The warrants here are sufficiently particular to withstand Kimbrough's challenge. The language in the warrants properly limited the executing officers' discretion by informing them what items were to be seized. *See Layne*, 43 F.3d at 132-33 (holding that a warrant seeking

"Child Pornography; records of victims; drawings; pictures; computer disks; sexual devices; videotapes; child abuse books; magazines; audio tapes; and any other obscene or child pornographic material" was particular enough to limit the officer's discretion).

Kimbrough's reliance on cases involving obscenity is misplaced.[2] The determination of which presumptively protected materials are obscene is a legal one and, therefore, not to be left to the discretion of the executing officers. Identification of visual depictions of minors engaging in sexually explicit conduct, in comparison, is a factual determination that leaves little latitude to the officers. *See Id.*; *See also United States v. Hurt*, 808 F.2d 707, 708 (9th Cir.), *cert. denied*, 484 U.S. 816, 108 S.Ct. 69, 98 L.Ed.2d 33 (1987) ("Any rational adult person can recognize sexually explicit *conduct* engaged in by children under the age of 16 when he sees it.")(emphasis in original). We therefore find this contention to be without merit.[3]

---

[2] Kimbrough relies primarily on *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); *Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431, (1965); *Lo-Ji Sales v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed. 2d 920 (1979); and *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

[3] Kimbrough's complaints regarding the broad seizure of his records and other papers are best addressed in the portion of this opinion focused on the execution of the warrants. The warrants' authorization for seizure of "bills, correspondence, receipts, ledgers, Postal receipts and telephone records all of which show orders and deliveries to or from any known foreign or domestic distributer of child pornography" are certainly sufficiently particular to withstand scrutiny. *See United States v.*

Kimbrough further contends that, even assuming the warrants were valid, they were illegally executed. He argues that the law enforcement agents seized virtually every record, document and paper found at the premises, and confiscated every video and audio cassette tape. The Government denies that the search was overbroad. Specifically, the Government, through the testimony of Agent Johnson at the suppression hearing before the trial court, argues that the seizure of all video and audio tapes was necessary because the titles of such tapes were not dispositive of their content and that the absence or presence of child pornography in such items could not be determined by a cursory examination on the premises.

Blatant disregard by executing officers of the language of a search warrant can transform an otherwise valid search into a general one and, thus, mandate suppression of all evidence seized during the search. *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988). The execution of a search warrant "must be one directed in good faith toward the objects specified in the warrant."

Layne, 43 F.3d 127, 133 (5th Cir. 1995) (finding that seizure of evidentiary materials does not implicate the First Amendment concerns implicated by seizures based on ideas); *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980)(finding a warrant for "records, documents and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films" to describe the things to be seized with sufficient particularity); *United States v. Jacobs*, 513 F.2d 564, 567 (9th Cir. 1974) (finding a warrant for "certain documents pertaining to the interstate shipment of obscene materials" to survive scrutiny).

Gurleski v. United States, 405 F.2d 253, 258 (5th Cir. 1968), *cert. denied*, 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769 (1969).

Kimbrough has failed to meet his burden of proof in challenging the execution of the search warrants. *See United States v. Carhee*, 27 F.3d 1493, 1496 (10th Cir. 1994); *United States v. Virgo*, 413 F.2d 691, 693 (5th Cir. 1969). The fact that the executing officers chose not to review each video tape, audio tape and document on the premises does not make this search presumptively invalid. While the executing officers seized numerous documents that were later determined to be irrelevant to the case against Kimbrough, the record reflects significant numbers of documents were left at the scenes after an initial review showed them to be not within the scope of the warrants. Kimbrough has not directed our attention to specific examples of seized items that would demonstrate an absence of the executing officers' good faith belief that the items were described in the warrants. We find this argument to be without merit.

Multiplicitious (*sic*) Counts Issue

Kimbrough contends that Counts 3 and 4 of the indictment against him are multiplicitious [sic] and should have been dismissed or the Government should have been required to elect a single count on which to proceed.[4] We review trial court rulings on multiplicity

---

[4] Count 3 charges Kimbrough with

> On or about March 4, 1993, . . . knowingly possess[ing] three (3) or more matters which contain

claims *de novo*. *United States v. Brechtel*, 997 F.2d 1108, 1112 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 605, 126 L.Ed.2d 510 (1993). The rule against multiplicity stems from the 5th Amendment to the Constitution which forbids placing a defendant twice in jeopardy for one offense. The rule prohibits the Government from charging

---

visual depictions that had been shipped and transported in interstate and foreign commerce by computer, the production of which involved the use of a minor engaging in sexually explicit conduct and which visual depictions were of such conduct, to wit, matters entitled:

'CHERRYA.GIF'
'CHERRYB.GIF'
'CHERRYC.GIF'
'WC221501.GIF'
'LITSIS.GIF'

In violation of Title 18, United States Code, Section 2252(a)(4)(B) and 2.

Count 4 charges Kimbrough with

On or about March 4, 1993, . . . knowingly possess[ing] three (3) or more matters which contain visual depictions which were produced using materials which had been transported, by any means, including interstate and foreign commerce, the production of which involved the use of a minor engaging in sexually explicit conduct and which visual depictions were of such conduct, to wit, matters entitled:

'MBON006.JPG'
'MBON007.JPG'
'DS-X-219.GIF'
'INNOCNT.JPC'
'KID013,GIF'

In violation of Title 18, United States Code, Sections 2252(a)(4)(B) and 2.

a single offense in several counts and is intended to prevent multiple punishments for the same act. *Id.*; *United States v. Heath*, 970 F.2d 1397, 1401 (5th Cir. 1992), *cert. denied*, ___ U.S. ___; 113 S.Ct. 1643, 123 L.Ed.2d 265 (1993); *United States v. Hurt*, 795 F.2d 765, 774 (9th Cir. 1986), *amended on other grounds*, 808 F.2d 707 (9th Cir.), *cert. denied*, 484 U.S. 816, 108 S.Ct. 69, 98 L.Ed.2d 33 (1987). Kimbrough raised this challenged to the charges against him prior to trial by way of a motion to dismiss and at trial as part of his motion for judgment of acquittal. The trial court denied both requests.

The Appellee first argues that the grouping of the offenses by the trial court under the Sentencing Guidelines removed the danger of multiple punishments. It contends that for "offenses that are to be grouped under U.S.S.G. § 3D1.2, the applicability of a single punishment prevents any Fifth or Eighth Amendment violations." This argument completely misstates applicable law. This Court has explicitly held that for double jeopardy purposes, sentences are not truly concurrent where a mandatory special assessment is separately imposed on each conviction. *United States v. Berry*, 977 F.2d 915, 920 (5th Cir. 1992). Kimbrough's sentence included mandatory special assessments for each count. Furthermore, the Supreme Court precedent clearly holds that, for purposes of double jeopardy, a "separate conviction, apart from the concurrent sentence, has potential adverse . . . consequences." *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740 (1985).

The Appellee next argues that the materials that give rise to the two possession-based counts are different

because the materials in Count 3 were themselves transported in interstate commerce while the materials referenced in Count 4 were produced using materials that had been transported in interstate commerce. The Appellee attempts to compare the separate counts here with counts charging possession of separate drugs or weapons. However, each count charges possession of "three or more" items and, under the particular facts of this case, each of the items listed in counts 3 and 4 both traveled in commerce (via the computer) and was produced using materials that traveled in interstate or foreign commerce.

Both Counts 3 and 4 charge violations of the same statute on or about the same date and both involve possession of three or more items. The only difference between the charges relied on by the government in their brief is the jurisdictional element – whether the pictures or the materials used to produce them traveled in commerce. We find this distinction to be artificial and an unlawful attempt to divide a single offense into multiple offenses.[5] *See Sanabria v. United States*, 437 U.S. 54, 66

---

[5] We decline to employ the Appellee's suggestion that the charges in question pass the different-element test articulated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932). That test applies to determinations of whether Congress intended the same conduct to be punishable under two criminal provisions. By contrast, Counts 3 and 4 both charge a violation of the same criminal provision. *See Sanabria v. United States*, 437 U.S. 54, 70 n.24, 98 S.Ct. 2170, 2182 n.24, 57 L.Ed.2d 43 (1978). That criminal provision states, in relevant part,

> (B) [any person who] knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual

n.20, 98 S.Ct. 2170, 2180 n.20, 57 L.Ed.2d 43 (1978)("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged.")

We must defer to the legislature's determination of whether a specific course of conduct constitutes one or more separate crimes. *Sanabria*, 437 U.S. at 70, 98 S.Ct. at 2182, 57 L.Ed.2d 43. In construing this statute, we look first to the plain language chosen by Congress. *United States v. Barlow*, 41 F.3d 935, 942 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1389, 131 L.Ed.2d 241 (1995). In this case, the plain language of the statute's requirement that a defendant possess "three or more" items indicates that the legislature did not intend for this statute to be used to charge multiple offenses.[6] Furthermore,

---

depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if-

(I) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section. Title 18 U.S.C. § 2252(a)(4)(B).

[6] It is this language that distinguishes the offense of possession of child pornography from the offenses of transporting and receiving child pornography for purposes of the multiplicity argument. *Cf. United States v. Cipollone*, 951 F.2d 1057, 1058 (9th Cir. 1991).

to the extent that the statute can be considered ambiguous, the rule of lenity requires us to resolve that ambiguity in favor of Kimbrough. *See United States v. Cooper*, 966 F.2d 936, 943 n.11 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 481, 121 L.Ed.2d 386 (1992)("When Congress fails to indicate the allowable unit of prosecution with clarity, doubt as to congressional intent should be resolved in favor of lenity for the accused.") We find that Counts 3 and 4 of Kimbrough's indictment are multiplicitious. *See Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955) (holding "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be respolved (*sic*) against turning a single transacion (*sic*) into multiple offenses"). Therefore, the trial court should vacate Kimbrough's conviction on either of Counts 3 or 4. *See Heath*, 970 F.2d at 1402; *Brechtel*, 997 F.2d at 1112.

Kimbrough further argues that his entire conviction should be reversed as he has been prejudiced by the multiplicitious indictment through the possibility that the repeated assertions of details regarding the two counts could have confused the jury by suggesting that several crimes were committed rather than one. We do not find that the trial court's refusal to dismiss one of the two counts requires reversal of Kimbrough's entire conviction. The trial court charged the jury that, "Each count and the evidence pertaining to it should be considered separately." Kimbrough has not presented specific factual allegations of potential confusion. We find that Kimbrough has failed to demonstrate that any jury confusion was sufficient to rise to the level of a constitutional violation.

Access to Evidence Issues

Kimbrough next argues that the Government's refusal to allow him to copy the items of evidence charged in the indictment and in restricting his access to the evidence violated his constitutional rights to due process and effective assistance of counsel. On September 10, 1993, the trial court granted Kimbrough's motion for discovery to the extent that it requested information discoverable pursuant to Federal Rules of Criminal Procedure 16 and the lines of cases stemming from *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The court ordered the government to "make discovery and give inspection" on or before September 17, 1993.

Kimbrough's motion had requested inspection and copying of the materials in question. Rule 16(a)(1)(C) provides in relevant part:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs [and] tangible objects . . . which are within the possession . . . of the government . . . and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Fed.R.Civ.P. 16(a)(1)(C). Despite Kimbrough's requests and the language of Rule 16, the Government refused to allow Kimbrough to copy the charged items of child pornography. Kimbrough moved for dismissal of Counts

1-4 of the indictment based on the Government's refusal to allow copying. He also moved for a continuance and to designate the matter as a "complex case" pursuant to the Speedy Trial Act. *See* 18 U.S.C. §3161(8)(B)(ii). In response, the government offered to take the child pornography to Kimbrough's expert to save the expert the trip to San Angelo. The Government also offered to allow Kimbrough to examine the child pornography at the United States Customs Service office, the United States Attorney's office or defense counsel's office. The trial court denied Kimbrough's motions.

Child pornography is illegal contraband. *See* 18 U.S.C. §2252(a)(4); Tex. Penal Code § 43.26; *New York v. Ferber*, 458 U.S. 747, 756-59, 102 S.Ct. 3348, 3354-55, 73 L.Ed.2d 1113 (1982). We decline to find that Rule 16 provides such contraband can be distributed to, or copied by, the defense. However, even if there was a Rule 16 violation, Kimbrough's argument fails. The Government's offer to make the materials available for inspection but not to allow them to be copied was reasonable. Furthermore, Kimbrough has failed to demonstrate that any actual prejudice arose from his inability to procure copies of the charged items. His conclusory assertion that the amount of material seized and the time it took the Government agents to review the material demonstrates he was precluded from having an adequate opportunity to review the material and obtain an expert for trial is simply insufficient. *See United States v. Cronic*, 466 U.S. 648, 663, 104 S.Ct. 2039, 2049, 80 L.Ed.2d 657 (1984) ("Neither the period of time that the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation, is necessarily

relevant to the question whether a competent lawyer could prepare to defend the case in [the time available]. The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge.") We find that any prejudice or technical violation of Rule 16 is insufficient to comprise a deprivation of Kimbrough's constitutional rights. We therefore find this contention to be without merit.

Fair Trial Issues

Kimbrough contends that he was denied a fair trial because he was refused an adequate opportunity to prepare for trial and because the District Court admitted numerous Government exhibits despite the Government having listed them as exhibits on the day of trial. A trial court's denial of a continuance is reviewed for abuse of discretion, viewed in light of all the circumstances, and requires a defendant to show serious prejudice. *United States v. Kelly*, 973 F.2d 1145, 1147-48 (5th Cir. 1992); *United States v. Terrell*, 754 F.2d 1139, 1149 (5th Cir.), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3505, 87 L.Ed.2d 635 (1985).

One month before trial, Kimbrough filed a motion pursuant to Title 18 U.S.C. Section 3161(8)B(ii) requesting a continuance based in part on his counsel's desire to have access to the charged material. The following day, September 10, 1993, the Government sent Kimbrough's counsel a telefax indicating that the materials seized from Kimbrough's residence and business would be available

for viewing the week of September 20th through the 24th of 1993. Kimbrough then filed a supplement to his motion for continuance arguing that the Government's "delay in making available to the defense all material in this case, [rendered] it impossible for [him] to be adequately prepared for trial by October 4, 1993." The trial court denied both motions without elaboration.

On October 6, 1993, the Government tendered its exhibit list containing 20 exhibits. The morning of trial, the Government submitted an amended exhibit list containing more than 70 exhibits. Kimbrough objected on the record to the introduction of these new exhibits. The Government responded that the earlier exhibit list had included most of the exhibits on the amended list and had merely not listed them individually. The Government noted that the remainder of the new exhibits were added in response to the defendant's exhibit list. The trial court found that the arguments were best taken up on an item-by-item basis as the exhibits were offered during the trial. Kimbrough made such objections as the trial progressed and the trial court overruled those objections.

Although we cannot condone unreasonable restriction of meaningful access to potential exhibits, Kimbrough has not shown the serious prejudice necessary to succeed on this argument. Any error, therefore, was harmless. Kimbrough's counsel was given two weeks notice of the week that the exhibits would be available for his inspection. As discussed above, Kimbrough's conclusory assertion that the amount of material seized and length of the Government's review of the material demonstrates prejudice is insufficient to succeed on this argument. *See Conic* [sic], 466 U.S. at 663, 104 S.Ct. at 2049, 80

L.Ed.2d 657. Kimbrough has failed to support his assertions that he was precluded from having an adequate opportunity to review the material or obtain an expert for trial. The nature of the defense raised – that the depictions had been altered and were not of actual children – would not require review of each document. Furthermore, while Kimbrough claims it was necessary for him to "consult with experts in the field of computer technology and pediatric and adolescent anatomy . . . and interview potential witnesses involved in the Government's investigation," he has failed to show the connection between his failure to accomplish these tasks and the trial court's denial of his motions for continuance. Similarly, he argues it was necessary to "have an analysis conducted of the computer files seized" but fails to describe what type of analysis would have been done and what he expected the analysis would have demonstrated. On the facts and arguments before us, we are unable to say that the trial court's decision to deny Kimbrough's motions for continuance prevented him from receiving a fair trial. We therefore find this argument to be without merit.

Kimbrough's argument regarding the Government's amended exhibit lists is similarly unconvincing. The Government contends that the expanded exhibit list added only two pieces of evidence, both of which were necessary for rebuttal of Kimbrough's defense. The Government contends that the remainder of the list merely specified which portions of the previously identified exhibits were to be introduced. Kimbrough, who bears the burden on this issue, has failed to rebut the government's assertion and an examination of the record supports the Government's contention. We find Kimbrough's

assertion that he was unfairly prejudiced by the admission of exhibits listed in the Government's amended exhibit list to be meritless. Constitutionality of Title 18 U.S.C. Section 2252 Issues Kimbrough contends that Title 18 U.S.C. Section 2252 is unconstitutional. He adopts the arguments of the Ninth Circuit holding the statute to be unconstitutional for lacking a scienter requirement for the age of minority. *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), *rev'd* ___ U.S. ___, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). Since the briefing on the case at bar, the Supreme Court has held that Section 2252 passes constitutional scrutiny because the term "knowingly" in Section 2252(a)(1) and (a)(2) "extends to both the sexually explicit nature of the material and to the age of the performers." *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464, 472, 130 L.Ed.2d 372 (1994). Thus, Kimbrough's argument as to Counts 1 and 2 is without merit. Furthermore, as the language and composition of Section 2252(a)(4) parallels the language in Section 2252(a)(1) and (a)(2), Kimbrough's argument is without merit as to Counts 3 and 4 as well.

Jury Instruction Issue

Kimbrough contends that the jury instructions did not explain the Government's burden on proving the *mens rea* as to each element of the offenses. The Court instructed the jury:

> As to counts one and two, Title 18, United States Code, Section 2252(a)(2), makes it a crime for any person to knowingly receive any visual depiction shipped or transported in foreign

commerce by any means, including by computer, if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly received certain visual depictions;

Second: That such visual depictions were shipped or transported in foreign commerce;

Third: That such visual depictions were shipped or transported in foreign commerce by any means, including by computer;

Fourth: That the production of such visual depictions involved the use of a minor engaging in sexually explicit conduct;

Fifth: That such visual depictions are of minors engaged in sexually explicit conduct; and

Sixth: That the defendant knew that at least one of the performers in such visual depictions was a minor.

The instructions as to counts three and four are substantially similar but substitute the possession language for the receiving language. Kimbrough argues that the Court should have instructed the jury that "it must find Defendant knew the producing of the depiction involved the actual use of a minor engaging in sexually explicit conduct."

As noted above, in *X-Citement Video, Inc.*, 115 S.Ct. at 472, the Supreme Court held that the term "knowingly" in Section 2252(a)(1) and (a)(2) "extends to both the sexually explicit nature of the material and to the age of the performers." *See also United States v. Burian*, 19 F.3d 188, 191 (5th Cir. 1994) (holding that Section 2252 requires "actual knowledge or reckless disregard of a performer's minority."). The trial court specifically instructed the jury the [sic] Kimbrough had to know at least one of the persons depicted was a minor. Further instruction regarding the age of the performers would have been redundant and is not required by the statute or the case law. Had the jury believed Kimbrough's defense – that the depictions had been altered and were not of actual children – they could have easily found so applying the instructions as given. The jury instructions properly charged scienter with regard to the age of the performers.

Sentencing Guidelines Issues

Kimbrough objects to three aspects of his Presentence Report ("PSR") and the resulting calculation of his sentencing guidelines. In examining the sentence imposed, we review the trial court's findings of fact for clear error and review purely legal conclusions or interpretations of the meaning of a guidelines *de novo*. *United States v. Meija-Orosco*, 867 F.2d 216, 221 (5th Cir. 1989), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L.Ed.2d 602 (1989); *United States v. Dean*, 59 F.3d 1479, 1494 (5th Cir. 1995). We review the trial court's determination "that conduct is relevant to the offense of conviction . . . under a clearly erroneous standard." *United States v. Cockerham*, 919 F.2d 286, 289 (5th Cir. 1990).

A. Two Level Increase for Prepubescent Minor or Minors Under the Age of 12

Kimbrough objected at sentencing to the increase for receiving materials involving prepubescent minors or minors under the age of 12. The PSR recommended this two-level increase under U.S.S.G. Section 2G2.2(b)(1). Kimbrough contends that the Government failed to produce any evidence to show that he intended to receive such materials.

At trial, United States Customs Office Agent Eric Rembold testified that a listing of a file entitled "BAM Young List" had been retrieved from Kimbrough's office computer. On that list, file FAM03.GIF is described as "Eight Years Indian Girl" and file PPO4@.GIF includes the words "Preteen School Girl" in the description. Agent Rembold further testified that both FAM03.GIF and PPO4@.GIF were retrieved from computer disks obtained during the execution of the search warrants and that both had been downloaded to Kimbrough's computer from BAMSE. We find that the trial court heard sufficient evidence, even apart from that contained in the PSR, to conclude that Kimbrough intentionally ordered and possessed child pornography which depicted prepubescent minors or minors under the age of 12, or, at the very least, had reckless disregard of the age of the performers. *See Burian*, 19 F.3d at 191. We therefore find no clear error in the two-level enhancement pursuant to U.S.S.G. Section 2G2.2(b)(1).

B. Four Level Increase for Material Portraying Sadistic or Masochistic Conduct

Kimbrough also objected at sentencing to the 4 level increase for material portraying sadistic or masochistic conduct or other violence. The PSR recommended this four-level increase under U.S.S.G. Section 2G2.2(b)(3). Kimbrough argues that the material involved in the counts of conviction did not portray such conduct and that, at any rate, there was no evidence that he intended to receive such material.

At trial, Agent Rembold testified that Kimbrough had downloaded file MBON006.JPG and file MBON007.JPG from the BAMSE. He further testified that Kimbrough's computer contained file descriptions of these two files: MBON006.JPG is described as "Bound and Gagged Spread in Chair" and MBON007.JPG is described as "Same Girl Almost Same Position." The PSR stated that "Two of the child pornography pictures admitted into evidence are those of a female minor in bondage. Adult pornography possessed by the defendant also displayed sado-masochistic acts." We find that the trial court heard sufficient evidence at trial to conclude that Kimbrough intentionally ordered and possessed pornography which depicted sadistic or masochistic conduct. We therefore find no clear error in the four-level enhancement pursuant to U.S.S.G. Section 2G2.2(b)(3)[7]

---

[7] Kimbrough objects to the use of adult pornography to enhance his sentence because private possession in the home of such materials is presumptively protected by the First Amendment. *See Stanley v. Georgia*, 394 U.S. 557 (1969). We need not reach the question of whether such adult pornography can

C. Five Level Increase for Distribution of Obscene Material

Finally, Kimbrough objected at sentencing to the five-level increase for his purported intent to distribute child pornography. The PSR recommended this five-level increase under U.S.S.G. Section 2G2.2(b)(2). He argues that there was no evidence that he intended to distribute the material.

A sentencing court must be afforded wide discretion in the sources of information it may consider. *United States v. Schmeltzer*, 20 F.3d 610, 613 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 634, 130 L.Ed.2d 540 (1994). Therefore, Kimbrough bears the burden of demonstrating that information the trial court relied on in sentencing is "materially untrue." *See United States v. Puig-Infante*, 19 F.3d 929, 943 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 180, 130 L.Ed.2d 115 (1994); *United States v. Flores*, 875 F.2d 1110, 1113 (5th Cir. 1989).

At sentencing, Agent Rembold testified that he recovered evidence from Kimbrough's office computer and a back-up tape which showed Kimbrough had set up his own bulletin board system named "Unbridled, Unlimited." A bulletin board system is designed to distribute and receive files. Agent Rembold testified that Kimbrough's bulletin board system included closed files containing pornographic material depicting children.

---

be considered for sentencing purposes as the child pornography admitted at trial provides sufficient basis to affirm the trial court's ruling.

Agent Rembold also testified that the search had uncovered advertisements for "Unbridled, Unlimited" which indicated that the bulletin board was a sexually oriented bulletin board. Agent Rembold testified that he found no evidence to show Kimbrough had actually engaged in a commercial distribution of the pornography.

Kimbrough offered no evidence to rebut Agent Rembold's testimony. Under these circumstances, the sentencing court was justified in relying on the testimony and on the PSR in finding that the five-level increase was warranted.

Cumulative Effect Issue

Finally, Kimbrough argues that even if no single alleged impropriety rose to the level of reversible error, taken together, their cumulative impact so prejudiced him as to require reversal of his conviction. *See United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976). We find, with the exception of Kimbrough's multiplicitous argument, Kimbrough's arguments to be without merit. Kimbrough's current argument merely restates arguments we have already rejected and completely fails to specify how the cumulative effects of these events prejudiced him. We therefore reject this argument.

CONCLUSION

We affirm the judgment of conviction regarding Counts One and Two. We reverse as to Counts Three and Four and remand for the trial court to vacate Kimbrough's conviction on either of those counts and to

resentence Kimbrough if the trial court chooses to do so. AFFIRMED IN PART AND REVERSED IN PART.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

Although I concur in most of the opinion of the Court, I dissent from Court's treatment of the "Multiplicitious Counts Issue." I am not convinced by the majority's statement that "[i]n this case, the statute's requirement that a defendant possess 'three or more' items would seem to indicate that the legislature did not intend for this statute to be used to charge multiple offenses." I believe the majority is reading too much into the "three or more" language.

Section 2252(a)(4)(B) states a crime of *possession*, with three alternative grounds for asserting jurisdiction under the Commerce Clause. Any person who

> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

such visual depictions involve child pornography, violates 18 U.S.C. § 2252(a)(4)(B). A conviction thus requires a showing that the defendant knowingly possessed 3 or more items depicting child pornography, and that each of these items also satisfies *one* of the alternative grounds for jurisdiction. The three items must each be shown to have *either* been "mailed," or "shipped or transported" in

interstate commerce, or "produced" from an item that was mailed or so shipped or transported. The jurisdictional requirement does not change the basic nature of the item or the crime, which is *possession of child pornography*. The three alternative jurisdictional grounds merely allows a federal court to decide the underlying violation of possession, it does not alter what is being possessed.

I therefore agree with the majority that the jurisdictional difference between the two sets of items in Counts 3 and 4 is insufficient by itself to support separate counts. The Government could not, for example, plead the *same* three items in separate counts merely because the same three had been "shipped" in interstate commerce *and* "produced" using materials which had been mailed or so shipped. The key, rather, is whether the items are in fact distinct and different items, regardless of whether they were "mailed," "produced," or "shipped."[1]

While it may be true that "[a] single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged," *Sanbria v. United States*, 437 U.S. 54, 66 n.20, 98 S.Ct. 2170, 2180 n.20, 57 L.Ed.2d 43 (1978), we have held

---

[1] The visual depictions referred to in the separate Counts 3 and 4 appear to be ten different items. That is, the depictions listed in Count 3 – "CHERRYA.GIF", "CHERRYB.GIF", "CHERRYC.GIF", WC221501.GIF", and "LITSIS.GIF" – appear to be different depictions from those listed in Count 4 – "MBON006.JPG", MBON007.JPG", DS-X-219.GIF", "INNOCNT.JPC", or "KID013.GIF". Accordingly, I believe the Government has not alleged the "same three items" in separate counts.

that the act of mailing three child-pornography photographs in separate envelopes may be punishable in three separate counts, even though the three photographs were mailed at the same time. *See United States v. Gallardo*, 915 F.3d 149, 151 (5th Cir. 1990) ("With respect to the child pornography statute, each separate use of the mail to transport or ship child pornography should constitute a separate crime because it is the act of either *transporting or shipping* that is the central focus of this statute.").[2] In the context of mail fraud, we have also held that "[e]ach separate use of the mail in furtherance of [a scheme to defraud] constitutes a separate crime." *United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984).

The first two sections of the child pornography statute and the mail fraud statute speak of "*any* visual depiction" and "*any* scheme or artifice" (or "*any* counterfeit or spurious coin") respectively. "*Any*" is synonymous with "one or more." And we have held that a prosecutor has discretion to bring a single count or several counts where there is more than one item. Why should we read the phrase "*three or more*" in a more restrictive manner? Under the majority's interpretation of the statute, a prosecutor could only charge a defendant with one count under § 2252(a)(4)(B) whether he possessed three books or several thousand.[3] I believe that some additional

---

[2] This language is quoted with approval in *United States v. Cipollone*, 951 F.2d 1057, 1058 (9th Cir. 1991), cited by the majority in footnote 6.

[3] My research has not uncovered any case that addresses the issue of multiple counts under this provision. In every case, the prosecution apparently chose to bring only one count under § 2252(a)(4)(B), even where, in one instance, the possession

authority, in the form of legislative history or analogous case law, should be required before we assume that Congress intended to distinguish this section of the statute from the other sections by limiting the prosecutor's discretion to bring multiple counts.[4]

It is not obvious how Congress could have written this provision to make it clearer that multiple counts were permitted. It would have been confusing to omit the "or more" language from the "three" because this would seem to suggest that the possession of *four or more* items would *not* be a violation. The phrase *"at least* three" does not say anything different from "three or more." Nor do I believe that Congress's meaning would have been much clearer if they had stated *"any* three or more," even though this would have more closely paralleled the preceding provisions.[5]

Therefore, it is more reasonable to assume that Congress simply wanted to heighten the evidentiary burden

---

charge involved ten items. *See United States v. Burian*, 19 F.3d 188, 189-90 (5th Cir. 1994) (defendant was in possession of ten video tapes received through the mails). If the prosecution has the discretion to bring a single count even where the facts would permit several counts, these cases do not tell us very much. In the present case, the Government apparently believed, mistakenly in my opinion, that it needed to rely on a jurisdictional distinction in order to bring more than one count.

[4] The legislative history contains no reference whatsoever to the language and purpose of § 2252(a)(4)(B). If Congress intended to remove prosecutorial discretion under this particular section of the statute, one would expect to find some reference to this limitation.

[5] (*sic*)Compare 18 U.S.C. § 2252(a)(1) *and* § 2252(a)(2) *with* § 2252(a)(4)(B).

for convictions based on the mere possession of child pornography by requiring the Government to prove at least three items, but that Congress did not intend to eliminate the prosecutor's discretion to bring additional counts where there were *more* than three items, as long as each count is supported by three different and distinct items. The "or more" language affirms the prosecutorial discretion rather than removes it, by allowing the prosecutor to charge nine different items, for example, as one count or as three.[6] Accordingly, I do not believe that the "three or more" language indicates that Congress intended to eliminate the prosecutor's discretion to bring one or several counts under this particular provision of the statute. Counts 3 and 4 should be held sufficient not because they assert different jurisdictional grounds, but because they are supported by at least three separate and distinct items. I would therefore affirm as to both counts.

---

[6] (*sic*)Similarly, Congress would not have used the language "each three" because this might be read to remove prosecutorial discretion, requiring prosecutors to bring a separate count for each group of three items discovered in the defendant's possession.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV. 9, 1995
CHARLES R. FULBRUGE III,
CLERK

No. 94-10088

D.C. Docket No. 1:93-CR-031-01-C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY BURTON KIMBROUGH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, and EMILIO M. GARZA, Circuit Judges, and PRADO[1], District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

---

[1] District judge of the Western District of Texas, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part, reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Emilio M. Garza, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE: January 4, 1996

A true copy

Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

s/ J. Wynne

By: _____
Deputy Jan. 4, 1996
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC. 28, 1995
CHARLES R. FULBRUGE III,
CLERK

No. 94-10088

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus.

TERRY BURTON KIMBROUGH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(December 28, 1995)

Before REAVLEY, and EMILIO M. GARZA, Circuit Judges, and PRADO*, District Judge.

---

* District Judge of the Western District of Texas, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES
41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

s/ Emilio M. Garza

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	U.S. DISTRICT COURT
	)	NORTHERN DISTRICT
v.	)	OF TEXAS
	)	FILED
TERRY BURTON KIMBROUGH	)	OCT. 8 1993
	)	NANCY DOHERTY, CLERK
	)	By: _____
	)	Deputy
	)	
	)	NO. 1:93-CR-31-C

ORDER

Came on for hearing the Defendant's Motion to Suppress Evidence in the above-styled and ___ numbered cause. Both parties appeared and announced ready.

After considering the testimony, evidence, and argument of counsel, the Court is of the opinion that the motion should be DENIED.

The Court finds that the search warrants in question were not facially insufficient. The warrants did adequately describe with particularity the place to be searched and the things to be seized. The Court further finds that such search warrants and supporting affidavits were based upon probable cause. Finally, the Court finds that the warrants were executed in a constitutional manner by the officers in question.

The exhibits are withdrawn from evidence.

The Clerk shall furnish a copy hereof to the Defendant and to all counsel of record.

SO ORDERED this 8th day of October, 1993.

s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	U.S. DISTRICT COURT
	)	NORTHERN DISTRICT
	)	OF TEXAS
v.	)	FILED
	)	SEP. 10 1993
TERRY BURTON KIMBROUGH	)	NANCY DOHERTY, CLERK
	)	By: s/ _____
	)	Deputy
	)	
	)	NO. 1:93-CR-031-C

ORDER

Came on for consideration Defendant's Motion Pursuant to 18 U.S.C. 3161(8)B(ii) (re Speedy Trial Act) to Continue Trial Date. The Court having considered the motion is of the opinion that same should be DENIED.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated September 10, 1993.

s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	U.S. DIST.COURT
	)	NORTHERN DISTRICT
v.	)	OF TEXAS
	)	FILED
TERRY BURTON KIMBROUGH	)	SEP. 24 1993
	)	NANCY DOHERTY, CLERK
	)	By: s/ _____
	)	Deputy
	)	
	)	NO. 1:93-CR-031-C

ORDER

Came on for consideration Defendant's Motion to Reconsider filed September 22, 1993. The Court having considered the motion is of the opinion that same should be DENIED.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated September 24, 1993.

s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	U.S. DISTRICT COURT
	)	NORTHERN DISTRICT
v.	)	OF TEXAS
	)	FILED
TERRY BURTON KIMBROUGH	)	SEP. 17, 1993
	)	NANCY DOHERTY, CLERK
	)	By: s/ _____
	)	Deputy
	)	
	)	NO. 1:93-CR-031-C

ORDER

Came on for consideration Defendant's Motion to Dismiss Counts 1 through 4 of the Indictment, filed September 14, 1993. The Court having considered the motion is of the opinion that same should be DENIED.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated September 17, 1993.

s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	U.S. DISTRICT COURT
	)	NORTHERN DISTRICT
v.	)	OF TEXAS
	)	FILED
TERRY BURTON KIMBROUGH	)	OCT. 25 1993
	)	NANCY DOHERTY, CLERK
	)	By: s/ _____
	)	Deputy
	)	
	)	NO. 1:93-CR-031-C

ORDER

Came on for consideration Defendant's Motion for New Trial Pursuant to Rule 33, Federal Rules of Criminal Procedure, filed October 22, 1993. The Court having considered the motion is of the opinion that same should be DENIED.

SO ORDERED.

The Clerk shall furnish a copy hereof to each attorney of record.

Dated October 25, 1993.

s/ Sam R. Cummings

SAM R. CUMMINGS
United States District Judge